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No. 85-1551

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

ALAN J. KARCHER, *et al.*,

Appellants,

v.

JEFFREY MAY, *et al.*,

Appellees.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

BRIEF OF THE ANTI-DEFAMATION LEAGUE OF B'NAI B'RITH AND AMERICANS FOR RELIGIOUS LIBERTY, *AMICI CURIAE,* IN SUPPORT OF APPELLEES

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QUESTION PRESENTED

Whether a state legislature's enactment of a statute requiring public school principals and teachers to direct group meditation at a prescribed time before each school day was intended to endorse and has the effect of endorsing prayer in violation of the establishment clause of the first amendment.

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Amici support the position of appellees and respectfully submit that the judgment of the United States Court of Appeals for the Third Circuit in the above captioned case be affirmed.[1]

STATEMENT OF THE CASE

Amici incorporate the statement of the case as set forth in the Brief of Appellees.

[1] Appellants and Appellees have consented to the filing of this brief and their letters of consent are filed with the Clerk of the Court. This brief was prepared with the assistance of Steven Arenson, law clerk, Anti-Defamation League.

INTEREST OF THE AMICI CURIAE

The Anti-Defamation League of B'nai B'rith was organized in 1913 to advance good will and mutual understanding among Americans of all creeds and races, and to combat racial and religious prejudice in the United States. The Anti-Defamation League has always adhered to the principle that the above goals and the general stability of our democracy are best served through the separation of church and state and the right to free exercise of religion.

In support of this principle, the League has previously filed as friend of the court in numerous cases dealing with prayer and other religious activities in the public schools, *see, e.g., Bender v. Williamsport*, 106 S. Ct. 1326 (1986); *Wallace v. Jaffree*, 105 S. Ct. 2479 (1985); *Widmar v. Vincent*, 454 U.S. 263 (1981); *Abington v. Schempp*, 374 U.S. 203 (1963). In the instant case, the League is able to bring to the issues raised on this appeal the perspective of a national organization dedicated to safeguarding all persons' religious freedoms. The Anti-Defamation League submits the accompanying brief because we believe the instant case raises serious questions concerning government support of religion in contravention of the establishment clause of the first amendment.

Americans for Religious Liberty (ARL) is a nonprofit, nationwide educational organization whose members represent the entire religious spectrum. ARL is dedicated to defending religious liberty for all persons. It maintains the defense of religious liberty requires the strictest adherence to the constitutional principle of separation of church and state, and that strict religious neutrality is required of our public schools by the first amendment.

SUMMARY OF ARGUMENT

This case presents the question of whether a state legislature may enact a statute requiring state school employees, principals and teachers, to direct group meditation in their public school classrooms.[2] The statute at issue today is only the most recent of New Jersey's series of proposed bills designed to permit organized prayer in the public schools and to avoid the decisions of this Court in

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[2] *Amici* do not here address the standing issue in this case but agree with the position of the Solicitor General on this question. *See* Brief for the United States as *Amicus Curiae* at 7-14.

Engel v. Vitale, 370 U.S. 421 (1962), and *Abington v. Schempp*, 374 U.S. 203 (1963). These legislative antecedents indicate New Jersey has "attempted to convey the message that children should use the moment of silence for prayer." *Wallace v. Jaffree*, 105 S. Ct. 2479 (1985). "However desirable this might be as a matter of private devotion, it is not a permissible state objective under the Establishment Clause," *Stone v. Graham*, 449 U.S. 39, 42 (1980). The state may not do indirectly what it cannot do directly. It is not permitted to legislate a substitute for vocal prayer.

New Jersey's statute is designed to substitute a "moment of silence" for organized vocal prayer in our public schools. Its purpose is to have the children use the moment of silence for prayer and to encourage them to do so. If implemented it would have the effect of advancing religion, because it requires state employees to conduct student meditation in a group, at a specified time and place, at the start of each school day. Even the risk of such state endorsement of prayer is unconstitutional. *See Grand Rapids v. Ball*, 105 S. Ct. 3216, 3225 (1985). Moreover, this statute is not necessary to accommodate the free exercise of religion. *See Abington*, 374 U.S. at 225. Individual prayer, vocal or silent, at the option of the student, has long been available on or off New Jersey public school premises. *See Jaffree*, 105 S. Ct. at 2491 n.45. New Jersey's legislated group meditation statute is designed to introduce organized prayer in the guise of a moment of silence. It is not merely an accommodation of a student's right to pray, but an endorsement of a religious exercise in a school setting.

"The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools." *Shelton v. Tucker*, 364 U.S. 479, 487 (1960). The New Jersey Moment of Silence law threatens these freedoms; it should therefore be held unconstitutional.

ARGUMENT

I. THE NEW JERSEY MOMENT OF SILENCE STATUTE REQUIRING GROUP MEDITATION BE DIRECTED BY STATE EMPLOYEES WAS ENACTED FOR RELIGIOUS PURPOSES WITH THE EFFECT OF ADVANCING RELIGION, IN VIOLATION OF THE FIRST AMENDMENT ESTABLISHMENT CLAUSE.

New Jersey's Moment of Silence law, N.J.S.A. § 18A:36-4 (West 1986) ("the statute" or "Bill 1064" or "the MOS") provides:

> Principals and teachers in each public elementary and secondary school of each school district in this State shall permit students to observe a 1 minute period of silence to be used solely at the discretion of the individual student, before the opening exercises of each school day for quiet and private contemplation or introspection.

Id. In reviewing a similar moment of silence statute out of Alabama, the Court asked "whether the state has conveyed or attempted to convey the message that children should use the moment of silence for prayer . . . whether the government intends to convey a message of endorsement or disapproval of religion." *Jaffree*, 105 S. Ct. at 2493. This question cannot be answered in the abstract, the Court held;[3] it "instead requires courts to examine the history, language and administration of a particular statute." *Id.* at 2499.

In determining whether the legislature intended to endorse prayer and religion, the *Jaffree* Court applied the test set forth in *Lemon v. Kurtzman*, 403 U.S. 602 (1971): "first, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion, . . . finally, the statute must not foster "an excessive government entanglement with religion." *Jaffree*, 105 S. Ct. at 2489-2490. The *Lemon* test has been applied by the Court "in every case involving the sensitive relationship between government and religion in the education of children." *Grand Rapids*, 105 S. Ct. at 3222.

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[3] A majority of the Court asserted the question is a factual one to be determined on a case by case basis; notwithstanding appellants' claims of a presumptive secular purpose, *see* Brief of Appellants at 36.

Under this test, the New Jersey Moment of Silence law is unconstitutional for its religious purpose of seeking to promote prayer in the schools, for its effect of advancing such religious practice, and because if implemented, it would entangle the public schools in administrating a potentially religious practice.

A. The New Jersey Moment of Silence Law Unconstitutionally Legislates Group Meditation for Religious Purposes; as Such it is Unconstitutional Under the First Amendment Establishment Clause.

1. The New Jersey Moment of Silence law's preeminent purpose is religious.

In determining whether a statute is consistent with the first amendment establishment clause, the Court has required there be a clear, preeminent or dominant secular purpose. *See Jaffree*, 105 S. Ct. at 2481; *Stone v. Graham*, 449 U.S. 39, 41 (1980); *McGowan v. Maryland*, 366 U.S. 420 (1961).[4] At issue is the legislation's primary purpose. *See Jaffree*, 105 S. Ct. at 2500 (O'Connor, J., concurring); *Stone*, 449 U.S. at 41-42.

The purpose of New Jersey's Moment of Silence law is clearly religious—it endorses prayer. So held the district court, J.S.A. 86a, and the Third Circuit. *Id.* at 26a. Appellants now claim such legislative purpose is irrelevant, suggesting distinctions be drawn between legislative "purpose" and "motive." *See* Brief of Appellants at 37. Yet the Court has drawn no such distinctions, but has used these terms interchangeably. *See Epperson v. Arkansas*, 393 U.S. 97, 108-109 (1968) *United States v. O'Brien*, 391 U.S. 367, 383 (1968). *See also Washington v. Davis*, 426 U.S. 240, 244 (1976); Ely, *Legislative and Administrative Motivation In Constitutional Law*, 79 Yale L.J. 1205, 1217 (1970).

Pursuant to the first amendment establishment clause inquiry, the legislature may simply not act with a religious purpose. *Compare Jaffree*, 105 S. Ct. at 2495; *Stone*, 449 U.S. 39, and *Abington*, 374

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[4] Notwithstanding this standard, Judge Becker in his dissent sets out to prove a negative—requiring proof of absence of any secular purpose. *See* 780 F.2d at 254.

U.S. 203, *with Palmer v. Thompson*, 403 U.S. 217 (1971); *O'Brien*, 391 U.S. 367, and *United States v. Darby*, 312 U.S. 100 (1941). *See Choper, The Religion Clauses of the First Amendment: Reconciling the Conflict*, 41 U. Pitt. L. Rev. 673, 685 (1980). The independent significance of purpose analysis in the first amendment religion clause area was affirmed by the Court in *Washington v. Davis*, 426 U.S. at 240 n.11, in distinguishing between *Palmer v. Thompson*, 403 U.S. 271 (1971) (eschewing consideration of illicit racial purpose) and *Lemon v. Kurtzman*, 403 U.S. 602 (1971) (upholding close scrutiny of purpose of a challenged parochiaid statute). Notwithstanding limitations on purpose inquiry in other areas of constitutional adjudication, the Court has continued to examine legislative purpose in religion clause cases and invalidated government legislation or practices for religious intent. *See, e.g., Stone*, 449 U.S. 80; *Epperson*, 393 U.S. 97.[5]

In *Jaffree*, a moment of silence statute's purpose—to "return voluntary prayer to the public schools"—was declared an impermissible objective by a majority of justices. The Court found "no secular purpose." *Id.* at 2490. New Jersey's Moment of Silence law has a similar religious objective and no clear secular purpose. It is therefore unconstitutional.

2. The New Jersey Moment of Silence law's religious purpose is reflected in its context and legislative history.

In *Jaffree*, this Court relied upon four evidentiary factors in determining the purpose of the Alabama statute. These factors, *see infra*, also point to the New Jersey Act's unconstitutional religious purpose. They are statutory text, the legislation's antecedents, official legislative history and legislative sponsor statements. *See* 105 S. Ct. at 2479; *see also Larson v. Valente*, 456 U.S. 228, 254 (1983); *Widmar*, 454 U.S. at 211 n.10; *Stone*, 449 U.S. 39. In the instant case, the *Jaffree* factors—primarily the New Jersey Moment of

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[5] Accordingly, to the extent appellants rely on *Palmer* and *O'Brien*, *see* Brief of Appellants at 32-35, such reliance is misplaced.

Silence law's context and legislative history—together with the public perception of the law reflect its religious purpose. *See* Note, *Daily Moments of Silence in Public Schools: A Constitutional Analysis*, 58 N.Y.U. L. Rev. 364, 386, 388, 392 (1983).

The context of the New Jersey Moment of Silence Act shows it is merely a less blatant, but effective substitute for the vocal prayer statutes declared unconstitutional by this Court in the 1960's in *Abington* and *Engel*. *See* Note, *supra*, at 367. While none of the twenty-five current moment of silence statutes were enacted prior to the *Engel* and *Abington* school prayer decisions,[6] New Jersey had a preexisting vocal school prayer statute.[7] Following this Court's decisions barring school prayer and Bible reading, New Jersey began the legislative process leading to today's Moment of Silence Act.[8] This historical context, *amici* submit, shifts the burden of proving constitutionality to the New Jersey state legislature. In New Jersey prior to the Supreme Court's prayer decisions, the putative secular pedagogical purposes discussed *infra* never gave rise to the proposal of moment of silence legislation.

New Jersey's Moment of Silence Act has its origins in 17 prior bills, all of which followed this Court's decisions holding school prayer unconstitutional. This legislative context was key to the district court's determination of purpose, as affirmed by the court of appeals. *See* J.S.A. 27a; 90a. Numerous bills prior to the instant Act specifically referred to the purpose of putting vocal prayer back in the schools in New Jersey. J.A. 395.

The first such legislation, A.146, proposed in 1969, specifically mentioned prayer. Similar bills authorizing "a brief period of silent prayer or meditation" were proposed but not enacted in 1970, 1972, 1974, 1976, 1978, and 1980. In 1978, the legislature adopted A.646

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[6] *See Jaffree*, 105 S.Ct. at 2498 n.1 (O'Connor, J., concurring).

[7] *See also* Alabama, Arkansas, Delaware, Florida, Georgia, Indiana, Kansas, Massachusetts, Oklahoma, Tennessee. *See Amicus* Brief of State Attorneys General, *Murray* v. *Curlett*, 374 U.S. 203 (1963).

[8] *See also* Ga. Code Ann. § 20-2-1050 (1982) (enacted 1969); Ill. Rev. Stat. ch. 122, ¶ 771 (1981) (enacted 1969); Kan. Stat. Ann § 72-5308a (1980) (enacted 1969); Mass. Gen. Law Ann. ch. 71, § 1A (1982) (enacted 1966); Ohio Rev. Code Ann. § 313.60 (Baldwin 1982) (enacted 1969).

which mandated "a brief period of silent meditation" at the beginning of each day; it was not approved by the governor and thus failed to become law. J.A. 397. In 1980, Assemblyman James Zangari, the main sponsor of the New Jersey MOS, introduced its predecessor, A 2197, calling for a one minute period of silence. This bill was also left unsigned by Governor Brendan Byrne. On March 8, 1982, Bill 1064 calling for a period of silence "for quiet and private contemplation or introspection" was proposed. It passed over the governor's veto, and became the subject of the instant lawsuit.

As in *Jaffree*, where the Court held prior legislation reflected the purpose of the statute at issue, 105 S. Ct. at 2491 ("the unrebutted evidence of legislative intent . . . is confirmed by a consideration of the relationship between this statute and the two other measures that were considered in this case"), here the district court found, and the circuit affirmed, the Act's seventeen prior drafts reflected the legislature's consistent religious purpose, and its attempts to mask that purpose. J.S.A. 27a; 87a, 90a. *See also Larson*, 456 U.S. at 254 (antecedent bill reflects consistent illicit legislative purpose).

The legislative context which prompted enactment of the instant New Jersey Moment of Silence statute as a substitute for vocal prayer casts doubt on the relevance of its text. *See Epperson*, 105 S. Ct. at 109 (reference to "divine creation" removed). *See also DeSpain v. DeKalb County Community School District 428*, 384 F.2d 836, 837 (7th Cir. 1967), *cert. denied*, 390 U.S. 906 (1968) (deleting "God" from daily recital did not prevent finding of unconstitutionality). As a substitute for vocal prayer, the MOS deletes explicit religious references, while continuing to convey the legislature's well known purpose of supporting prayer in the public schools. Thus, the New Jersey Moment of Silence law still embodies the hallmarks of prayer. The text requires the directed group silence to be at the same time, every school day, and it requires the congregating of the class as a group, under the aegis of a teacher presiding as the leader—elements symbolic of organized vocal prayer. *See, e.g., Duffy v. Las Cruces*, 557 F. Supp. 1013 (D.N.M. 1983).

Other evidence of Bill 1064's religious purpose lies in its legislative history. Legislative history, whether from official or unofficial

sources such as newspaper articles and letters from the public have long been considered by the Court to be helpful indicators of legislative purpose. *See, e.g., Larson*, 456 U.S. at 254 (relying on transcripts); *Epperson*, 393 U.S. at 272 n.16 (relying on newspaper ads); *see also Beck v. McElrath*, 548 F.Supp. 1161, 1163-64 (M.D. Tenn. 1982) (use of transcripts).

As in *Jaffree*, *see* 105 S. Ct. at 2490, the district court below found evidence of religious purpose in statements by sponsors of the bill. In the absence of official legislative history in New Jersey, these sponsor statements were recorded by witnesses at the hearings and newspaper articles. *See* J.A. 121. *See also Duffy*, 557 F. Supp. at 1015 (relying on "historical context, events leading up to passage of the Act, and the contemporaneous statements of the legislative sponsors" in the absence of legislative history in New Mexico). For example, the principal sponsor of Bill 1064, Assemblyman Zangari, called for the restoration of vocal prayer and Bible reading in the schools. *See* J.A. 275, 368. *See also* J.A. 35-37, 65-88. Assemblyman Zangari had also sponsored prior bills calling for various religious practices: one calling for an amendment to the United States Constitution to permit prayer in public places, including public schools, A.162 (1980), another providing for a period of prayer or scripture reading in each school before the beginning of the school day, A. 2196 (1980), and still another providing for a one minute period of silence after the beginning of each school day, A.2197 (1980). Further, as declared by Assemblyman Wolf, "whether we want to hide behind contemplation or reflection it's prayer." J.A. 65. Editorials noted "it is—as openly conceded by Senate President Carmen Orechio, D-Essex, a back-door school-prayer bill." J.A. 83.

Public perception, *see Epperson*, 393 U.S. at 108 n.16, of the MOS statute also showed widespread understanding of this religious purpose. *See generally* J.A. 74-87.[9]

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[9] This understanding was considered by the district court below to be material to the law's likely effect. J.A. 103. In ruling that newspaper articles and editorials were admissible as evidence of legislative intent and public perception, Judge Debevoise stated that "newspaper articles, magazine articles, editorials, these would bear on the public perception of the purpose and effect of the legislation." *Id.* at 121.

The context, legislative history, and public perception of the New Jersey statute reveal its preeminent religious purpose. As found by the district court below and affirmed by the circuit, the statute also lacks a secular purpose. J.S.A. 27a, 94a; J.A. 190-191, 293. Its putative pedagogical purpose, *see* Brief of Appellants at 42, is mere makeweight. Whether secular purposes could be imagined for state imposed silence, *see, e.g., Gaines v. Anderson*, 421 F. Supp. 337 (D. Mass. 1976), is not the issue. Speculative legislative purpose has not sufficed for establishment clause scrutiny.[10] The question is whether the statute's actual purpose is secular. *See Jaffree*, 105 S. Ct. at 2490; *Stone*, 449 U.S. at 41.

That the secular purpose for New Jersey's moment of silence law is pretextual is clear from the law's origins in the Supreme Court's prayer decisions. *Cf. Widmar*, 454 U.S. at 27 n.10 (preexisting policy reflects secular purpose). There is no tradition for a moment of silence. The ostensible pedagogical purpose for the MOS neither predated enactment of this legislation nor this lawsuit, but rather was a post-hoc rationalization. J.S.A. 87a. *See also Duffy*, 557 F. Supp. at 1016 (holding school board failure to discuss secular purposes before adopting moment of silence policy indicated secular justification was "clearly the product of afterthought"). Moreover, while appellants claim the purpose of the statute is secular, the government as *amicus* in support of appellants concedes the purpose is accommodation of prayer—a religious purpose. The government agrees resolution of this case would bear on Congress' authority to legislate vocal prayer, *see* Brief for the United States at 1.

The text of the New Jersey statute also undermines its ostensible secular purpose. First, it is unclear whether the statute requires or permits students to participate, *compare* J.S.A. 29a *with id.* at 94a. If voluntary, the state concedes it is a religious exercise, *see Abington*, 374 U.S. at 224, while leaving weighty "pedagogical" concerns merely to student choice. Whether or not the group contemplation is

[10] For example, in *Stone*, while the Ten Commandments were considered to be a preeminent religious text, the Court recognized there were secular purposes coincident with the posting and study of the Ten Commandments, yet these secular purposes did not save the practice because the actual and preeminent government purpose in posting the commandments was religious.

mandatory for students, according to the circuit, it is required for teachers and principals. *See* J.S.A. 19a (teachers "must permit"). There are no "pedagogical" purposes for requiring teachers statewide to direct group meditation without discretion. Experts below so testified, J.A. 163, particularly regarding the varying pedagogical concerns for students of different ages, and their testimony was found compelling by the district court, J.S.A. 88a. *See generally* J.A. 188-92, 250-57. *See Duffy*, 557 F.Supp. at 1017 (observing that if the moment of silence had a pedagogical purpose, teachers would have discretion over its implementation). Finally, to the extent group silence might be useful for pedagogical purposes, (though no evidence on this question was presented to the New Jersey legislature), such opportunities predate the instant Act, require no statute, and thus could adequately be served by other methods not violative of the Constitution. J.A. 265.

The district court held, relying on expert testimony, J.A. 229, and the court of appeals affirmed, that there was no secular purpose for the New Jersey statute. To the contrary, the New Jersey statute was found simply to be a ruse to circumvent this Court's decisions. *See* J.S.A. 27a, 28a, 87a, 94a. When the context and legislative history of a statute indicate religious purposes, and "the secular purpose articulated by the legislature is merely a 'sham,'" *Wallace*, 105 S. Ct. at 2494 (Powell, J., concurring), the Court will not defer to a pretextual secular purpose. *See, e.g., Stone*, 449 U.S. at 41-42; *Abington*, 374 U.S. at 223. The district court below found that like the Alabama statute in *Jaffree*, the New Jersey MOS law has a religious purpose and no secular purpose. This finding was supported by the evidence and should be affirmed.

B. Implementation of the New Jersey Moment of Silence Law Involves the New Jersey Public Schools in the Advancement of Religion in Violation of the First Amendment Establishment Clause.

1. The highest establishment standard applies in this case because New Jersey has endorsed prayer for children in the public schools.

The effect of advancing religion is not a question of fact but of law. *See Jaffree*, 105 S. Ct. at 2500. The highest level of scrutiny

must be applied in this case because the Moment of Silence law legislates as to children and the public schools. At issue is a twofold aid to religion—the government's objective assistance, and the symbolic effect of such assistance on young and impressionable children. Where children are concerned, even the risk of appearance of advancing religion is problematic. *See Grand Rapids*, 105 S. Ct. at 3225-3226, 3230; *Aguilar v. Felton*, 105 S. Ct. 3232, 3237 (1985). *See also Meek v. Pittenger*, 421 U.S. 349 (1975).

Eschewing the Court's standard set in *Grand Rapids* and *Aguilar*, providing that the risk of advancing religion is impermissible, the circuit court held the moment of silence did not advance religion because its effect was not religious "for all pupils." J.S.A. 19a. The court went on to analogize the instant law to the pledge of allegiance and found excusal of nonparticipating students a remedy sufficient to mitigate any effect of advancing religion. Yet, whether a statute is voluntary is immaterial to its effect of advancing religion. Legislated vocal school prayer was held unconstitutional despite its voluntariness. Excusal is simply not a constitutionally sufficient remedy for an establishment clause violation. *Engel*, 370 U.S. at 430; *see Jaffree*, 105 S. Ct. at 2491. Moreover, insofar as the New Jersey Moment of Silence law has a religious purpose, it is completely distinguishable from the pledge of allegiance which has the secular purpose of advancing civic beliefs. *See West Virginia v. Barnette*, 319 U.S. 624, 633-634 (1943). Before the Court therefore is the effect of advancing religion in the public schools of a statute with a conceded religious purpose. Such religious purpose to endorse prayer is a good first indicator of its intended effect. *See, e.g., Stone*, 449 U.S. at 42; *Beck*, 548 F. Supp. at 1165.

2. The New Jersey Moment of Silence Law endorses prayer by providing the aid of state employees and the public schools.

The New Jersey Moment of Silence law has the effect of advancing religion in at least two different ways.

Bill 1064 is a symbol of organized school prayer. Its origins as reflected in its context and legislative history lie not in any tradition

of contemplation, *cf. Marsh v. Chambers*, 463 U.S. 783 (1983), but rather in the prayer laws struck by this Court in the 1960's. Given the utter absence of any independent tradition for silent meditation, Bill 1064 stands only as an eloquent symbol of its legislative history—a substitute for vocal school prayer.

The New Jersey Moment of Silence law's statutory terms also reflect this symbolic meaning. As Rev. George D. Younger testified below, one of the theologically accepted definitions of "contemplation" is prayer. "Both meditation and contemplation . . . have a religious significance in our culture." J.A. 34. *See also* J.A. 139-140; 11 Encyclopaedia Judaica 1218 (1971) (describing meditation as a "term . . . referring to protracted concentration of thought on supernatural lights of the divine world, and of the spiritual worlds in general").

Furthermore, silent prayer retains the objective signs of organized vocal prayer: a group leader, a prescribed time and place, a student congregation, head bowing, clasping of hands. The repeated ritualized meditation in a group with the teacher leading has the inevitable effect of advancing prayer.

The state here is providing assistance—the use of its schools, employees and compulsory attendance laws—to promote prayer, a religious practice. This endorsement of prayer is a "utilization of the tax-established and tax-supported public school system to aid religious groups to spread their faith." *McCollum* v. *Board of Education*, 333 U.S. 203, 210 (1948). *See also Epperson*, 393 U.S. at 108-109; *Abington*, 374 U.S. at 223. Even if the prayer involved is silent, governmental endorsement is impermissible. *Compare Abington*, 374 U.S. 203 (barring vocal Bible reading) *with Stone*, 449 U.S. at 42 (striking the posting of Ten Commandments: "nor is it significant that the Bible verses involved in this case are merely posted on the wall rather than read aloud").

The coercive aid of the compulsory school attendance laws, which gather the student congregation, *McCollum*, 333 U.S. 203, 209-210, and the assistance of teacher monitoring, *Abington*, 374 U.S. at 225, are impermissible. These benefits are distinguishable from the *de minimis* indirect aid cases relied upon by appellants. *See*

Brief for the United States at 22, *relying on Mueller* v. *Allen*, 463 U.S. 388 (1983). In such "indirect" aid cases, the government has utilized "primarily secular means to accomplish a primarily secular end, and no 'primary effect' of advancing religion has thus been found." *Grand Rapids*, 105 S.Ct. at 3228. Relying on this rationale, the Court has upheld programs providing secular textbooks and bus transportation to nonpublic school students. *Id.* In contrast, use of public school teachers has been held to run the risk of promoting religious doctrine and proselytizing in violation of the establishment clause. J.A. 45. *See Grand Rapids*, 105 S. Ct. at 3227, 3229.

Bill 1064's unconstitutional advancement of prayer and religion is not hypothetical. The statute was implemented unconstitutionally. Teachers, students and the public understood the law to require students to pray. And, there was considerable evidence that teachers encouraged or coerced students to pray. J.S.A. 76a, 79a; J.A. 38-46. Teachers such as Jeffrey May were disciplined for not directing students to observe the law, J.S.A. 39a-49a, while students were disciplined for failing to comply with the statute. J.S.A. 76a-77a; J.A. 29, 30, 33, 38, 41. *See Grand Rapids*, 105 S. Ct. at 3225, 3226; *see also Walter v. West Virginia Board of Education*, 610 F. Supp. 1169, 1173 (S.D.W. Va. 1985); *Gaines v. Anderson*, 421 F. Supp. 337, 340 n.4 (D. Mass. 1976). As declared in *Jaffree*, "the message of endorsement would seem inescapable if the teacher exhorts children to use the designated time to pray." *Id.* at 2499.

3. The New Jersey Moment of Silence law also provides the symbolic message of state endorsement of prayer.

Compounding the objective aid to religion afforded by the public school premises, compulsory attendance laws and teachers which advance prayer is Bill 1064's symbolic effect. The New Jersey MOS law would be implemented in both public elementary and secondary schools where students are young and impressionable. "The inquiry into this kind of (symbolic effect) must be conducted with particular care when many of the citizens perceiving the governmental message are children in their formative years." *Grand Rapids*, 105 S.

Ct. at 3226. *Cf. Widmar*, 454 U.S. at 274; *Marsh*, 103 S. Ct. at 3335 (distinguishing between adults not susceptible to "religious indoctrination" and children subject to "peer pressure"). The youth and impressionability of the students in the New Jersey public schools enhances the effect of school endorsement of prayer pursuant to this Act. This greater effect on children was recognized by the Court in *Jaffree*, 105 S. Ct. at 2503 (O'Connor, concurring), and dates back to the Court's consideration of vocal school prayer. *See Abington*, 374 U.S. at 203; *Engel*, 370 U.S. 421; *McCollum*, 333 U.S. 203. "The crucial question is whether the State has conveyed or attempted to convey the message that children should use the moment of silence for prayer." *Jaffree*, 105 S. Ct. at 2499. It distinguishes the MOS from those cases upon which appellants would rely. *See* Brief of Appellant at 42.

Students in New Jersey will understand what the public understands—that the legislature's purpose was to promote prayer in the public schools. J.A. 237, 257. In addition, because of their youth and impressionability, students feel compelled to pray when teachers or other students pray. J.A. 32-33, 165, 172, 199, 302, 305. *See Grand Rapids*, 105 S. Ct. 3226; *Walter*, 610 F. Supp. at 1172-73 (praying student harasses nonpraying student with anti-Semitic epithet). As the Court noted in *Jaffree*:

> That a child is offered an alternative may reduce the constraint, it does not eliminate the operation of influence by the school in matters sacred to conscience and outside the school's domain. The law of imitation operates, and nonconformity is not an outstanding characteristic of children. *McCollum*, 333 U.S. at 227 (Frankfurter, J., concurring).

105 S. Ct. at 2492 n.51.

4. The New Jersey Moment of Silence law prefers certain prayer over others.

Without regulations, the New Jersey moment of silence's implementation was left up to each local school board, thereby putting the minority at the mercy of the majority. J.A. 233. *See* Stone, *In Opposition to the School Prayer Amendment*, 50 U. Chi. L. Rev. 823, 842 (1983). At its best the MOS' implementation is nonsectar-

ian—producing an official folk religion. As found by the district court, such implementation is coercive for those who either "profess no religion and to whom any form of prayer is offensive," J.S.A. 97a; those who believe the state should "have no part in religious matters," *id.* at 95a; and those whose practices involve other kinds of prayer. *See id.* at 96a. The statute may actually threaten observance of other faiths. *Compare* New Jersey's MOS *with* Va. Code § 2.1-203 (1980) (barring hand gestures). *See also* Kauper, *Prayer, Public Schools and the Supreme Court*, 61 Mich. L. Rev. 1031, 1065 (1963). At its worst, the MOS' implementation is sectarian—a mere fr[illegible] of the religious practices of teachers or a principal. At least one commentator has noted the brevity of the "moment" of silence impliedly allows only for certain Christian prayers, e.g., the Lord's prayer—and not for those of other denominations; thus preferring Christianity over non-Christianity. Note, *The Unconstitutionality of State Statutes Authorizing Moments of Silence in the Public Schools*, 96 Harv. L. Rev. 1874, 1886 n.76 (1983).

C. Implementation of the New Jersey Moment of Silence Law Requires Excessive Administrative Entanglement of the State in Religious Matters.

State assistance to religion through public school teachers involves excessive entanglement in violation of the first amendment.[11] "[B]ecause assistance is provided in the form of teachers, ongoing inspection is required to insure the absence of a religious message." *Aguilar*, 105 S. Ct. at 3238.

In *Lemon*, this Court found the supervision necessary to ensure that teachers in parochial school were not conveying religious messages to their students would constitute excessive entanglement:

> Unlike a book, a teacher cannot be inspected once to determine the extent and intent of his or her personal beliefs and subjective acceptance of the limitations imposed by the first amendment. These prophylactic contacts will involve excessive and enduring entanglement between state and church.

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[11] The political divisiveness considered by the circuit, *see* J.S.A. 17a, is only one of two entanglement concerns; *amici* focus here on the state's entanglement in the administration of assistance to religion. *See Aguilar*, 105 S.Ct. at 3237, *citing McCollum*, 333 U.S. at 212.

Aguilar, 105 S. Ct. at 3237, 3238, *citing Lemon*, 403 U.S. at 619.

The numerous entanglement problems posed by the MOS were attested to below. J.A. 27. Principals would have to monitor teachers to ensure they are ideologically neutral. *See Karen B. v. Treen*, 653 F.2d 897, 902 (5th Cir. 1981); *Duffy v. Las Cruces*, 557 F. Supp. at 1021. Ironically, teachers would even have to monitor students to ensure voluntariness. *See, e.g., Lubbock v. Lubbock*, 669 F.2d 1038, 1047 (5th Cir. 1982); *Karen B.*, 653 F.2d at 902. In general, New Jersey parents oppose public school teacher control over religious education. J.A. 45.

II. THE NEW JERSEY MOMENT OF SILENCE LAW IS NOT AN ACCOMMODATION STATUTE NEEDED FOR FREE EXERCISE.

As discussed above, the New Jersey Moment of Silence law is unconstitutional because of its intent and effect to endorse prayer. Nor may it be saved by a free exercise interest. The statute is not necessary and, thus, goes beyond accommodation—to promote prayer and religion.

In evaluating the Alabama silent prayer statute, the *Jaffree* Court indicated that to the extent the purpose of the law was to accommodate prayer it was not required as a free exercise matter and was therefore an endorsement of religion. A majority of the justices held there was no preexisting government burden on free exercise of religion without moment of silence statutes and therefore, such legislation was not a necessary accommodation. *See* 105 S. Ct. at 2491 n.45; *id.* at 2504, 2505 (O'Connor, J. concurring). *See also Abington*, 373 U.S. at 299 (Brennan, J., concurring); *Stein v. Oshinsky*, 348 F.2d 999 (2d Cir.), *cert. denied*, 382 U.S. 957 (1965); Stone, *In Opposition to the School Prayer Amendment*, 50 U. Chi. L. Rev. at 830.

Yet, the circuit and Solicitor General would characterize the New Jersey Moment of Silence statute as an accommodation statute necessary for "neutrality" in the schools. The court of appeals suggests the MOS balances out the present prohibition on school prayer: "the state equally injects itself into religious matters when it desig-

nates a time and place when children and teachers may not pray," J.S.A. 22a, implying the prohibition of organized school prayer is in and of itself an establishment of religion imposed by the Court. Similarly the Solicitor would characterize the MOS as "legislation removing obstacles to wholly voluntary religious observance." Brief for the United States at 24.

Bill 1064 cannot be defended as an act of religious neutrality. *See Epperson*, 393 U.S. at 109. There is no burden or obstacle on prayer—whether vocal or silent. In evaluating this claim in the school prayer cases and most recently as concerned silent prayer in *Jaffree*, the Court rejected the notion that barring organized prayer during the school day burdens free exercise. *See Abington*, 374 U.S. at 299. The school day runs only from nine in the morning to three in the afternoon, leaving many other opportunities for organized prayer. In New Jersey, as in Alabama, "there was no governmental practice impeding students from silently praying for one minute at the beginning of each school day. . . . " *Jaffree*, 105 S. Ct. at 2491 n.45. Individual prayer is always available in the public schools; group prayer is available after school hours, or off school premises. In rejecting government accommodation of group prayer on school premises during the school day, Justice O'Connor noted:

> Of course, the state might argue that [the law] protects not silent prayer, but rather group silent prayer under state sponsorship. Phrased in these terms, the burden lifted by the statute is not one imposed by the State . . . but by the Establishment Clause as interpreted in *Engel* and *Abington*.

Id. at 2505 (O'Connor, J., concurring).

The prohibition on school prayer, the Court has held, is not inconsistent with the twin religion clause mandates: "There was no need to 'accommodate' or to exempt individuals from any general governmental requirement because of the dictates of our cases interpreting the free exercise clause." *Jaffree*, 105 S. Ct. at 2491 n.45. "While the Free Exercise Clause clearly prohibits the use of state action to deny the rights of free exercise to *anyone*, it has never meant that a majority could use the machinery of the State to practice

its beliefs."[12] *Abington*, 374 U.S. at 226. (emphasis in original).

Those who support the instant Act as an accommodation reject the possibility of neutrality in the public schools. Their premise is that the public schools should not be free of organized prayer as this Court sought in the 1960's—but only that the assistance to prayer be "equal." So long as participating students may bow their heads and think of something else, they contend, the state's assistance to religion has been impartial. *See* Brief for the United States at 28-30. Yet the notion that government may assist religion—so long as it is impartial—has not and will not constitute neutrality in the public schools. Unlike indirect financial aid, the assistance provided organized prayer in the public schools is coercive and direct. Neutrality requires the public schools to eschew organized prayer. Public education in this country need not adopt a viewpoint on religion; it may remain nonreligious—and thus neutral, because there are alternatives to the public schools for the exercise of group prayer.

In considering the constitutionality of moment of silence legislation in *Jaffree*, this Court indicated its commitment to neutrality in the public schools. "[T]he individual freedom of conscience protected by the first amendment embraces the right to select any religious faith or none at all." This is the freedom which is threatened by the instant New Jersey Moment of Silence law. Neither the putative pedagogical secular purposes for moments of silence nor the conflicting claims of accommodation for prayer are adequate to justify the law. New Jersey's MOS is nothing other than a legislative substitute for the vocal prayer statutes found unconstitutional by the Court in the 1960's. This Court ought similarly to hold it unconstitutional.

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[12] The Solicitor General errs in analogizing this case to those involving military schools, Brief for the United States at 1, for there are different free exercise issues where government has imposed military obligations with consequent constraints on free exercise options, *see Abington*, 374 U.S. at 299 (Brennan, J., concurring).

CONCLUSION

For all the reasons discussed above we respectfully ask that the decision of the Court of Appeals for the Third Circuit be affirmed.

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